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**The ABC's of the Appointment Process:
Advice, Bureaucratic Politics and Consent**

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The ABC's of the Appointment Process:
Advice, Bureaucratic Politics and Consent

"Who will judge the judge?" flashed the advertisement on Washington area televisions in mid-September 1991. Above those words appeared the faces of three liberal Democratic senators on the Senate Judiciary Committee -- Edward Kennedy, Joseph Biden, and Alan Cranston -- each of whom had survived a celebrated scandal and would soon vote on the nomination of Clarence Thomas to serve on the Supreme Court.

Sponsored by two independent right wing groups, the advertisement was intended to influence the Senate's confirmation process in favor of Judge Thomas, by neutralizing prospective anti-Thomas commercials similar to those used to defeat the Supreme Court nomination of Judge Robert Bork in 1987.¹ The sponsors were also meddling with a very basic constitutional process -- the appointment process -- by attempting to embarrass and intimidate certain senators into voting affirmatively to confirm Judge Thomas.²

The use of the media, as illustrated by this case, is only one example of the not-so-subtle institutional, political and social forces that influence the appointment process. In fact, both the President's choice of nominees and the Senate's exercise of its advice and consent power over federal appointments are frequently affected by bureaucratic politics. To some extent external pressures were expected by the original Framers of the Constitution; but they could not have anticipated the dramatic growth of federal bureaucracies, the expanded oversight role of the modern Congress, and the strong influence exerted by aggressive media and special interest groups.

To analyze this evolution and the extent to which bureaucratic politics now influences the appointment process, this paper will examine the appointment process from two perspectives: the original intent of the Founding Fathers and the actual historical exercise of the shared executive and legislative powers. What will become clear from this analysis is that the Framers of the Constitution intentionally designed institutional conflict into the process, but the Senate has largely chosen not to exercise its powers. Instead, it has frequently deferred to the President, except for certain controversial nominees or judicial candidates.

Despite this deference, however, recent confirmation cases reveal that outside forces -- the media, public interest groups, unwieldy federal bureaucracies, congressional staffs, and opposing political partisans (more hostile as the result of divided government) -- affect the appointment process in ways never anticipated by those at the 1787 Constitutional Convention. In essence, bureaucratic politics now fills the gap left by the Senate and plays an important role in the appointment process. Although not foreseen by the Framers, this result is not inconsistent with their original intent. Bureaucratic politics, rather than active Senate action, now serves to restrain the President's actions and inject popular concerns into the process.

Constitutional Origins

Article 2, section 2, clause 2 of the United States Constitution, the "Appointments Clause," reads in part that the President

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose

Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Appointments Clause gives the President the sole constitutional power and personal responsibility for nominations. But, as a security measure, the actual appointment of ambassadors, diplomats, judges, and other officers can only be accomplished with the cooperation of the Senate.³

Both the choice of language and the grammar itself suggest the intended relationships between the President and the legislative branch. While nothing qualifies the nomination authority given to the President, i.e., the power to choose the nominee, the President's appointment power is limited to certain specified positions and is shared with the Senate through the "advice and consent" requirement.⁴ The language also makes it clear that Congress can legislatively vest appointment authority in someone other than the President.⁵

Central to this issue is the fact that the "power to hire, and especially to fire, is the essence of control of federal administration."⁶ To the extent that Congress through the enactment of laws, or the Senate through the advice and consent process, can affect who is "hired" during the appointment process, the legislative branch can exert considerable influence over executive branch positions. In addition, "Congress' undisputed power to create an office includes the corollary power to narrow the group from which the President may select civil officers."⁷ For example, since 1947, "a person must have been a civilian for ten years to be eligible for appointment as the Secretary

of Defense."⁸ Thus, even the President's nomination authority is not absolute. Once a nomination is made, the actual appointment requires the Senate's consent. In addition, all unspecified powers relating to appointments belong to Congress.

The choice of the "advice and consent" language after several months of haggling was not an accident. The delegates struggled to find the right formula -- vesting sole authority in the executive, giving the Senate veto authority over judicial appointments, or retaining appointment authority in the national legislature.⁹ The dispute over the final appointment language was resolved by the Committee of Eleven¹⁰ on September 4, 1787. The Committee reported the Appointments Clause with the familiar advice and consent language, and it was adopted without dissent three days later.

Why did the delegates finally agree on the sole nomination authority and the advice and consent language? Alexander Hamilton summed up how the process ought to work, when he said, "The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate."¹¹ Thus, the appointment process was intended to be one involving shared powers, where responsibility could be clearly affixed to either the President or the Senate.¹² Alexander Hamilton, however, did not foresee a contentious process. Rather, he expected a "silent operation" in which the knowledge that a nominee would be scrutinized by the Senate would cause the President to make good choices. The word "advice" also suggests that a consultative and deliberative process could occur, publicly or privately, before or after an actual

nomination.¹³ The "consent," however, would occur when the Senate publicly acted on the nomination.

Historical Overview

An examination of the Senate's exercise of its "advice and consent" role reveals a tradition of deference to the President.¹⁴ In 1977, the Washington Post reported, "Senate records show that only eight Cabinet appointees have been rejected and that since World War II only 16 major non-Cabinet appointees have been rejected either by committees or by the full Senate."¹⁵ Since then, the Senate has refused to confirm John Tower as Secretary of Defense in the first Senate rejection of a Cabinet appointee since the Eisenhower administration.¹⁶ In both cases, Republican Presidents -- one newly in office, the other a two-term lame duck -- faced Democratic Senates.

The Tower nomination, however, may have been unique. As a former committee chairman who had alienated many Senate colleagues, Tower had few supporters.¹⁷ That disadvantage, coupled with allegations of drinking, womanizing, and cozy dealings with defense contractors, raised serious questions in the minds of many senators over Tower's "fitness" for the job. The fact that Tower was an early nominee of a newly installed President further fueled the confrontation that led to his rejection. One Senate staffer formerly responsible for committee action on nominees affirmed that substantial deference is given to Presidential choices and considerable political pressure is applied to push nominations through the Senate.¹⁸ Less deference, however, is given to first round nominees of new Presidents when senators are concerned with determining future policy direction and expressing their own special

interests and views.¹⁹

The Senate has taken a more active role in scrutinizing key judicial nominees, as well as nominees to regulatory boards and commissions.²⁰ "Because Supreme Court justices are appointed for life, they are relatively unaccountable to the shifting political desires of the people.... The justices, therefore, are not supposed to be accountable to the electorate but to those who framed and ratified the Constitution."²¹ Only during the confirmation process does the Senate have a significant relationship with the judicial branch of government.²² Since political and ideological considerations often play a crucial role in the President's nomination of Supreme Court candidates,²³ political considerations also necessarily play a key role in the Senate's decision.²⁴

In the 19th century, the Senate rejected one out of every four nominees for the Supreme Court, often strictly on partisan political grounds.²⁵ In 1844 President John Tyler sent six Supreme Court nominations to the Senate; one was confirmed. The others were delayed by senators hoping that Henry Clay would be elected President and make other nominations. Political delaying tactics by the Senate were common; few judicial nominees were rejected for their lack of qualifications.²⁶

More recently, Professor Stephen Gillers pointed out that "of the 24 derailments [of Supreme Court nominees] in American history, the vast majority -- two for every seven nominations -- occurred before 1900. This century has seen the much less spectacular ratio of one rejection in every 13 nominations."²⁷ Like the 19th century, rejections during

the 20th century have been caused by enmity between the President or the candidate and key senators, delaying action by opposition senators hoping to outlast the incumbent President, and in some limited cases a lack of merit or integrity.²⁸ With other judgeships, "nominees get virtually a free ride. Two years into his presidency, Bush has appointed seventy federal judges without a fight."²⁹ The Senate Judiciary Committee hasn't rejected a judicial nominee since 1988.³⁰

Even though the Senate has more actively scrutinized Supreme Court nominations, many senators are not clear exactly what their role is.³¹ Striking a balance between questions on judicial philosophy and personal views is a tricky business. Prior to 1925, Supreme Court nominees were not asked to testify during the confirmation process. In 1939 not one senator asked William O. Douglas a question during the confirmation deliberations. Since 1955, the scope of questioning has varied dramatically, depending upon how the senators felt about the nominee.³² Senator Joseph Biden has asserted that the Senate could reject a Supreme Court nominee solely for political reasons; Senator Robert Dole has argued that the Senate's role is to weigh qualifications, not politics.³³ Senator Strom Thurmond has urged that the Judiciary Committee's function should be limited to consideration of the nominee's competence, temperament and integrity.³⁴ History, however, is full of examples in which politics was indeed the key reason for rejection of a Supreme Court nominee.

External Factors Influencing the Process

Overall, the record is clear that the Senate has not fully exercised its constitutional prerogatives. Over 800 executive branch

jobs require Senate confirmation,³⁵ yet few result in more than a pro forma hearing after months of bureaucratic processing at the White House and on Capitol Hill. Perhaps this is because there is frequently no political gain from a messy confirmation fight.³⁶

Bureaucratic influences now pervade the process. The White House has elaborate screening mechanisms for applicants -- transition teams and "scrub teams" -- for candidates being seriously considered for nomination.³⁷ In a process that can take more than eight months, potential nominees must clear White House bureaucratic hurdles,³⁸ and the nomination process may also be delayed by other institutional requirements -- FBI checks,³⁹ inspector general investigations,⁴⁰ or delays in obtaining specialized input such as that rendered by the American Bar Association on judicial candidates.⁴¹

In some cases Cabinet politics may also become involved. In the Bush administration, Cabinet incumbents may pick their subordinates, subject to Presidential approval.⁴² The need to create a team able to produce consistent policymaking within an agency may also slow the process of finding the right candidates. Other key players in the process, the White House personnel chief and the Chief of Staff, can cause bottlenecks as they respond to their staffs, outside pressures and political influences.⁴³

The Senate too is often a bottleneck because of bureaucratic politics. Senators with busy daily schedules rely heavily on their staffs during the confirmation process. Committee and personal staff members (often with their own ideological agendas) screen nominees -- checking qualifications,⁴⁴ safeguarding prerogatives of "senatorial

courtesy,⁴⁵ verifying political backgrounds, and sometimes hunting for adverse information to attack unpopular nominees.⁴⁶ Staff members, often powerful, savvy players themselves, understand clearly the political implications of the process, the impact of empty offices on the President's ability to formulate policies, and the sectors within which their senator or committee operates. Bargaining and compromises over nominees, program direction, related policy issues, and special interests abound.

Outside influences by the media and various special interest groups are also pervasive. Controversial nominations may cause "platoons of interest groups" to converge on hearings and senators' offices.⁴⁷ Special interest groups may perform special functions like the American Bar Association or may simply lobby.⁴⁸ Sometimes these groups force delays in the confirmation process,⁴⁹ or they may generate partisan votes resulting in rejection of the nominee.⁵⁰ By understanding the stakes of the confirmation process, these special interest groups have become increasingly aggressive.⁵¹

The same pattern is evident in the media. The recent tawdry hearings on the nomination of Clarence Thomas were the result of an intensive media campaign.⁵² By reformulating issues, creating press opportunities for politically astute senators, and increasing the sophistication of media use, members of the media have themselves become an important force in the appointment process.⁵³

Other bureaucratic political factors are also at work during the confirmation process. The effects of divided government -- partisan voting and linkage of confirmation to other issues -- can also be seen.

Although the Senate can reject a candidate if it does not like his or her answers, senators are reluctant to do that for political reasons; they must continue to work with the President on other issues.⁵⁴ Sometimes this same give-and-take affects the President's decision whether to press for confirmation; an appointment battle could adversely affect Senate support on other critical issues.⁵⁵ Senate delays in confirmations can also be deliberate efforts to focus attention on specific issues. Any senator putting a hold on a nomination can indefinitely halt confirmation action.⁵⁶

A strong link also exists between the Senate's oversight functions and its power over appointments. Having the power of the purse and the power of impeachment do not necessarily give the Senate sufficient credible tools to influence executive policy direction; these are both extreme steps. The confirmation process, however, provides another avenue for senators to provide front-end guidance rather than simply corrective action for programs gone awry. Senator Carl Levin recognized this power when he said, "We all ask questions at confirmation hearings, hoping to obtain answers that affect actions."⁵⁷ Sometimes a candidate may be asked to submit answers to questions for the record that deal with prospective duties, not simply individual qualifications.⁵⁸ In these cases, the real intent is to use the leverage of the appointment process against the executive branch and its bureaucracies. For example, Senators Cohen and Kennedy warned the President a couple of years ago that no defense nominees would be confirmed until the Department of Defense completed the reorganization creating the special operations forces.⁵⁹

From this analysis it is clear that both bureaucratic politics and basic constitutional tensions between the executive and legislative branches have repercussions on many aspects of the appointment process. Were the Senate to undertake greater scrutiny of nominees and conduct more hearings, intra-governmental conflicts and the influence of outside forces would burgeon.

For the most part, the two-part appointment process works as designed in 1787 despite the Senate's limited participation. Instead of active Senate involvement, bureaucratic politics and bureaucratic institutions have largely supplanted vigorous Senate action. Popular influence over Presidential appointments (aimed at preventing executive tyranny and cabals) now comes from diverse sources inside and outside the government, not just elected senators. Thus, the constitutionally shared appointment powers have melded with bureaucratic politics to create a modern appointment process that captures both the vision wisdom of the original Framers and the realities of government operations two centuries later.

1. "Not So Hidden Persuaders," Time 16 Sep. 1991: 27.
2. The sponsors of this advertisement were well aware of the impact of the anti-Bork campaign, which "intimidated not only Senators who spin like weather vanes, but also Senators made of sterner stuff." "Bogeyman Fund-Raising," Wall Street Journal 15 Oct. 1987: 32.
3. As Gouverneur Morris put it, "As the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security." See James E. Gauch, "The Intended Role of the Senate in Supreme Court Appointments," University of Chicago Law Review 337 (1989): 350-51. This law review article contains an exceptionally thorough analysis of the Appointments Clause with considerable detail and quotation from original records of the Constitutional Convention.
4. Gauch 339.
5. In fact, Congress has empowered federal judges to appoint supervisors of elections, and that action has been upheld. *Ex parte Siebold*, 100 U.S. 371, 379-84, 397-98 (1879).
6. A. Michael Froomkin, Note, "In Defense of Administrative Agency Autonomy," Yale Law Journal 787 (Mar. 1987): 787-89.
7. Froomkin 806. Froomkin goes on to point out that Congress has imposed a variety of different requirements, e.g., age, sex, race, citizenship, educational experience, language proficiency, or residency on the pool of eligible nominees from which the President may choose. Although Congress may not initiate the process by selecting the particular nominee, it may severely narrow the potential applicant pool.
8. Froomkin 807.
9. Gauch 341-44.
10. The Committee of Eleven was composed of one delegate from each state and met to resolve disagreements over specific language in the newly drafted Constitution.
11. The Federalist No. 77 (Hamilton) (1788).
12. Alexander Hamilton, writing as Publius in The Federalist No. 76 in 1788, clearly articulated the accepted viewpoints when he wrote:

[One] man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment.

The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation.... A single well-directed man, by a single understanding, cannot be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body....

...[E]very advantage to be expected from such an arrangement would, in substance, be derived from the power of nomination, which is proposed to be conferred upon him; while several disadvantages which might attend the absolute power of appointment in the hands of that officer would be avoided [by the Senate's participation]. In the act of nomination, his judgment alone would be exercised; and as it would be his sole duty to point out the man who ... should fill an office, his responsibility would be as complete as if he were to make the final appointment. There can, in this view, be no difference between nominating and appointing.... The same motives which would influence a proper discharge of his duty in one case, would exist in the other. And as no man could be appointed but on his previous nomination, every man who might be appointed would be, in fact, his [the President's] choice.

...
To what purpose then require the cooperation of the Senate? ...[T]he necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.

13. Proper "advice" involving comprehensive review might prevent the nomination of an unqualified candidate or insure that the Senate favors a specific nomination. President Reagan actively solicited the views of key senators before nominating Anthony Kennedy to the Supreme Court in an effort to achieve a swifter and smoother confirmation process. See Gergen 39 and Gauch 340. It has also been suggested that more emphasis should be placed on "advice" than on "consent." Robert F. Nagel, "No Show Show," The New Republic 7 Oct. 1991: 20-21.

14. Ronald Brownstein, "Advise Goes With Consent," New York Times 5 Jan. 83, late city final ed.: A19.

15. Susanna McBee, "Senate Confirmation Process: Half Rubber, Half Stamp," Washington Post 10 Sep. 1977, final ed.: A5.

16. Thomas M. DeFrank, Ann McDaniel and Douglas Waller, "Bush Risks His Chips on Tower," Newsweek 20 Feb. 1989: 19.
17. Richard Cohen, "And Alexander Hamilton's Advice," editorial, Washington Post 6 Mar. 1989, final ed.: A15.
18. McBee A5.
19. Mark Reiter, Senior Professional Staff Member, Senate Environment and Public Works Committee, personal interview, 17 Dec. 1991.
20. Walter J. Oleszek, Congressional Procedures and the Policy Process, 3d ed. (Washington, D.C.: Congressional Quarterly, 1989) 273.
21. David Chang, "Toward a U.S. Judiciary Free of Political Passions," letter, New York Times 13 Oct. 1985, late city final ed., sec. 4: 20.
22. Randall R. Rader, "The Independence of the Judiciary: A Critical Aspect of the Confirmation Process," Kentucky Law Journal (1989): 817.
23. David Bryden, "Judicial Nominations - The Bork Affair," Current 22 Sep. 1988: 24.
24. William G. Ross, "Participation by the Public in the Federal Judicial Selection Process," Vanderbilt Law Review Jan. 1990: 25.
25. Gauch 337.
26. Gauch 337-38.
27. Stephen Gillers, "Derailments En Route to the Supreme Court," letter, New York Times 13 Oct. 1985, late city final ed., sec. 4: 20.
28. Gillers 20. Written prior to the Bork rejection, Gillers also suggests that "almost no rejection has been based on a candidate's views." On the contrary, Robert Bork was rejected because of his legal philosophy and inflammatory positions on controversial issues. See Bryden cited above for a more complete discussion of the Bork case.
29. Herman Schwartz, "Judging Judges," The Nation 22 Apr. 1991: 508-09.
30. Bob Cohn, "There Goes the Judge," Newsweek 22 Apr. 1991: 31.
31. Vik D. Amar, "The Senate and the Constitution," Yale Law Journal May 1988: 1122.

32. Ruth Marcus, "Before 1925, Type of Questions Senators Asked Nominees Was A Moot Issue," Washington Post 27 Jul. 1990, final ed.: A16.

33. Jacob Weisberg, "Foundermania Breaks Out in the Senate," Newsweek 24 Aug. 1987: 14.

34. Marcus 16.

35. David Gergen, "How to Improve the Process," U.S. News and World Report 28 Oct. 1991: 39.

36. Schwartz 509.

37. The Bush transition team reviewed 19,000 applications for 3,000 positions. Frances Seghers, "Help Wanted: 3000 Appointees. Right Wing Purity Not Required," Business Week 23 Jan. 1989: 49. In addition to checking political credentials, staff members must review each candidate's ethical qualifications. Richard Fly, "Empty-Office Syndrome Is Hurting Bush's Mandate," Business Week 12 Jun. 1989: 37.

38. Typical bureaucratic impediments delaying actual nomination by the President include written application forms requiring responses to specific White House staff questions on ethics, financial holdings and lawbiding character; completion of security clearance investigations; and professional reference checks.

39. Ann Devroy, "Bush, Biden Discuss Confirmation Ills," Washington Post 22 Oct. 1991, final ed.: A5.

40. "Stello Withdraws Bid for DOE Nuclear Post," Congressional Quarterly Almanac (Washington, D.C.: Congressional Quarterly, 1990) 309-10.

41. Stephen Wermiel, "Chaotic Confirmation Process for Bench Nominees Suggests Politics, Not Qualifications, Prevails," Wall Street Journal 14 Aug. 1986, eastern ed.: 48.

42. Seghers 49.

43. Fly 37.

44. Oleszek 273.

45. McBee A5. Under the rule of senatorial courtesy, the Senate will not act on a nomination opposed by any senator of the President's party.

46. Kenneth L. Woodward, "Court Charade," Newsweek 23 Sep. 1991: 18.

47. Woodward 18.

48. Ross 35.

49. Don Phillips, "FAA Nominee Blocked by Metzenbaum," Washington Post 28 Nov. 1991, final ed.: A4.

50. "Carol Iannone: Act II," editorial, National Review 12 Aug. 1991: 20.

51. Max Lerner, "Courting Rituals," The New Republic 1 Feb. 1988: 16-18.

52. Gergen 39.

53. Lerner 16.

54. Neil A. Lewis, "Frustrated Thomas Panel Ends Hearings With Talk of Overhaul," New York Times 21 Sep. 1991, late city ed.: 7.

55. DeFrank 19.

56. Recently, Senator Metzenbaum blocked the confirmation of the FAA nominee until certain safety questions were answered. See Phillips A4.

57. Oleszek 274.

58. In July 1991, Nancy Dorn was confirmed as Assistant Secretary of the Army for Civil Works. "Senate Confirms Dorn for Army Corp Post," Journal of Commerce 22 Jul. 1991: 8B. Although the press questioned her experience with port and waterway issues, several senators required her to submit for the record very technical answers to questions about ongoing projects affecting their constituents before they would allow her nomination to go forward. From the tenor of the questions, it is clear they were not intended to test her knowledge but rather were directed toward the administration in an effort to influence water policies. "Nominations Before the Senate Armed Services Committee, First Session, 102d Congress," S. Hearing 102-__ (Washington, D.C., U.S. Government Printing Office: 1991).

59. Roger H. Davidson and Walter J. Oleszek, Congress and Its Members, 3d ed. (Washington, D.C.: Congressional Quarterly, 1990) 263.

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